



Port State Inspection against IUU Fishing: Structural Changes in High Seas Fisheries Regulation

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Introduction

UNCLOS Art. 218: Enforcement by port States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

⇔ **Absence of provisions like UNCLOS Art.218
in international fisheries law**

1. Definition of port State jurisdiction

(1) Differences from coastal state jurisdiction

- Coastal State jurisdiction
 - Application to the conduct of foreign vessels inside of its national jurisdiction
 - On the basis of its sovereignty
- Port State jurisdiction
 - Application to the conduct of foreign vessels beyond its national jurisdiction (ex. Discharges, fisheries)
 - Extraterritoriality
 - What is its jurisdictional basis?

(2) Type of port State measures (PSM)

(a) Prohibition of landing and transshipping

(b) Refusal to use port services

(c) Refusal to allow a port of entry

(d) Boarding inspection

(e) Detention

(f) Seizure

(g) Monetary penalty

(h) Confiscation of vessels and cargo

(i) Criminal proceedings

Territorial measures

Port State's right to refuse port entry recognised by customary international law

'Punitive' measures

More problematic but not introduced as PSM on high seas fisheries

2. Allocation of jurisdiction

between flag State and port State

(1) Limited port State measures on fisheries in the 1990s

UNCLOS (1982)

Art. 87: Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: [...]

(e) freedom of fishing, subject to the conditions laid down in section 2;

UNCLOS (1982)
Art. 92: Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

UNCLOS (1982)

Art. 218: Enforcement by port States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

The FAO Compliance Agreement (1993)

Art. 5: International Cooperation

2. When a fishing vessel is voluntarily in the port of a Party other than its flag State, that Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State accordingly. Parties may make arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary to establish whether the fishing vessel has indeed been used contrary to the provisions of this Agreement.

(2) Port State inspections under the UNFSA

The UN High Seas Fisheries Agreement(1995)

Art. 23: Measures taken by a port State

1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. [...]
4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

3. Legal Development on port State inspections

(1) Establishment of a port entry system

Advanced initiatives for Regional Fisheries Management Organisations (RFMOs)

- **NAFO**, Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO [NAFO/GC Doc. 97/6], Serial No. N2950 (1997)
- **CCAMLR**, Conservation Measure 118/XVI: Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures (1997)
- **ICCAT**, Recommendation by ICCAT Concerning the Ban on Landings and Transshipments of Vessels from Non-Contracting Parties Identified as Having Committee [sic] a Serious Infringement [Rec. 98-11] (1998)

FAO, International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU) (2001)

55. Prior to allowing a vessel port access, States should require fishing vessels [...]
seeking permission to enter their ports to provide reasonable advance notice of
their entry into port, a copy of their authorization to fish, details of their fishing
trip and quantities of fish on board, with due regard to confidentiality
requirements, in order to ascertain whether the vessel may have engaged in, or
supported, IUU fishing.

57. States should publicize ports to which foreign flagged vessels may be
permitted admission and should ensure that these ports have the capacity to
conduct inspections.

(2) Boarding inspections under the PSMA

The Agreement on Port State Measures (PSMA) (2009)

Art.3: Application

1. Each Party shall, in its capacity as a port State, apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports, except for:
 - (a) vessels of a neighbouring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing ; and
 - (b) container vessels that are not carrying fish or, if carrying fish, only fish that have been previously landed, provided that there are no clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing.

PSMA (2009)

Art.12: Levels and priorities for inspection

1. Each Party shall inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement.
2. Parties shall seek to agree on the minimum levels for inspection of vessels through, as appropriate, regional fisheries management organizations, FAO or otherwise.
3. In determining which vessels to inspect, a Party shall give priority to:
 - (a) vessels that have been denied entry or use of a port in accordance with this Agreement;
 - (b) requests from other relevant Parties, States or regional fisheries management organizations [...]; and
 - (c) other vessels for which there are clear grounds for suspecting that they have engaged in IUU fishing or fishing related activities in support of such fishing.

Draft agreement on port State measures (2007)

Art.12: Conduct of inspections

2. Each Party shall, in carrying out inspections in its ports:
 - (e) subject to appropriate arrangements with the flag State of the vessel, invite the flag State to participate in the inspection;

PSMA (2009)

Art.13: Conduct of inspections

2. Each Party shall, in carrying out inspections in its ports:
 - (e) in case of appropriate arrangements with the flag State of the vessel, invite that State to participate in the inspection;

EU Regulation 1005/2008 (2008)

Art.4: Inspection in port schemes

1. With a view to prevent, deter and eliminate IUU fishing, an effective scheme of inspections in port for third country fishing vessels calling at the ports of Member States shall be maintained.

Art.9: General principles

1. Member States shall carry out inspections in their designated ports of at least 5 % of landing and transshipment operations by third country fishing vessels each year, in accordance with the benchmarks determined by the procedure referred to in Article 54(2) on the basis of risk management, without prejudice to the higher thresholds adopted by regional fisheries management organisations.

Japanese Act on the Regulation of Fishing Operations by Foreign Nationals

Art.6-2: Inspections (Amended in 2014)

1. If authorized fishery supervisors or authorized fishery supervising officers find it necessary to enforce this Act, they may enter fishing grounds, vessels, place of business, offices, or warehouses; and may inspect the conditions, books and documents, or other articles, or question the relevant persons.
2. [...]
3. The authority under paragraph (1) must not be construed as being granted for criminal investigation.

Japanese Act on the Regulation of Fishing Operations by Foreign Nationals

Art.4: Permission for Calling

1. A captain of a foreign fishing vessel [...] must obtain permission from the Minister of Agriculture, Forestry and Fisheries, as prescribed by Order of the Ministry of Agriculture, Forestry and Fisheries, to have that vessel call at a port of Japan [...].

Japanese Enforcement Regulation of the Act on Regulation of Fishing Operation by Foreign Nationals

Art.3: Application for Permission for Calling

1. A captain seeking to obtain the authorization under the provisions of Article 4, paragraph (1) of the Act must submit a written application containing the following information to the Minister of Agriculture, Forestry and Fisheries: [...]

NAFO Conservation and Enforcement Measures 2024

Article 51: Port Entry and Inspection of NCP vessels

1. Each Master of an NCP vessel shall request permission to enter port from the competent authority of the port State Contracting Party in accordance with the provisions of Article 45.
2. Each port State Contracting Party shall: [...]
 - (f) where it permits entry, ensure the vessel is inspected by duly authorized officials knowledgeable in the CEM and that the inspection is carried out in accordance with Article 43 paragraphs 11 – 17; [...]

Conclusion

- ✓ **Acceptance trends**
the port States conduct boarding inspections to foreign vessels without flag State's consent on high seas fisheries
- ✓ **Character of port State inspections**
 - Less punitive in nature
 - Essential enforcement measure to guarantee the effectiveness of the port entry system
- ✓ **Current development?**
To coordinate the allocation of maritime jurisdiction between flag States and port States over the inspection authority

References

- Robin Geiß and Christian J. Tams, “Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?” Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Martinus Nijhoff Publishers, 2015)
- Arron N. Honniball, *Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing* (GVO Drukkers & Vormgevers, 2019)
- Kenji Kagawa, *Commentary on the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks* (Suisan Shincho Sha, 1997) in Japanese
- Atsuko Kanehara, “Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas,” *Japanese Yearbook of International Law*, No. 51 (2008)
- Erik J. Molennar, “Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage”, *Ocean Development and International Law*, Vol. 38 (2007)
- Yumi Nishimura, “Development of International Disciplines on IUU Fishing Regulations,” *International Affairs*, Vol. 693 (2020) in Japanese
- Rosemary G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Publishers, 2004)
- Cedric Ryngaert and Henrik Ringbom, “Introduction: Port State Jurisdiction: Challenges and Potential,” *The International Journal of Marine and Coastal Law*, Vol. 31, Issue 3 (2016)
- Judith Swan, “Port State Measures: from Residual Port State Jurisdiction to Global Standards,” *The International Journal of Marine and Coastal Law*, Vol. 31 (2016)
- Patrick Vrancken, *State Ocean Jurisdiction* (Routledge, 2023)
- Yaodong Yu, Yue Zhao and Yen-Chiang Chang, “Challenges to the Primary Jurisdiction of Flag States Over Ships,” *Ocean Development and International Law*, Vol. 49, No. 1 (2018)



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Grazie mille!